DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E.
Washington, D.C. 20002

Parent, on behalf of Student[1],	)	
	)	**Case Number: 2012-0503**
Petitioner,	)	
	)	**Hearing Officer: James McKeever**
v.	)	
	)	
DISTRICT OF COLUMBIA PUBLIC SCHOOLS And OSSE	)	**Hearing Date: September 25, 2012**
	)	
	)	
Respondent.	)	

OSSE
STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

I. Introduction and Procedural Background

This is a due process proceeding brought in accordance with the Individuals with Disability Education Act 2004 ("IDEA"), and its implementing regulations codified at 20 U.S.C. Section 1400 et seq., against Respondent, District of Columbia Public Schools (DCPS) and the Office of State Superintendent for the District of Columbia (OSSE).

Petitioner is the grandparent and Foster Parent of the Student, a [redacted] special education student who last attended the a non-public school NPS, in Rockville, Maryland that was funded by DCPS (Due Process Complaint-DPC).

On July 20, 2011, Petitioner filed a DPC against DCPS and OSSE stating that the Student is a "ward" of the District of Columbia who was placed through the Child and Family Services Agency (CFSA) of Washington, D.C. with her Grandmother in Frederick, Maryland (DPC). Petitioner contends that the Student is a "ward" of the District of Columbia and that the Respondents' denied the Student a free and appropriate public education (FAPE) by failing to offer the Student a full-time therapeutic placement with

[1] Case information listed at Appendix "A."

Extended School Year (ESY) services during the 2011-2012 and 2012-2013 school year, respectively (DPC). The Student is eligible for special education and related services as a student with a disability under the IDEA.

On July 30, 2012, DCPS filed a Response to the DPC and asserted that DCPS does not owe the Student a FAPE because the Student is a resident of the State of Maryland (DCPS' Response).

A resolution session was held on August 8, 2012. The parties were unable to resolve the complaint, but continued the resolution period to August 19, 2012. The 45-day timeline began August 20, 2012.

The Prehearing Conference (PHC) was held on August 23, 2012. Counsel for Petitioner, counsel for OSSE and counsel for DCPS participated. During the PHC, the parties discussed and clarified the issues and the requested relief. It was agreed that the Due Process Hearing (DPH) would be held on September 25, 2012 and that the five-day disclosures would be filed by September 18, 2012.

The Five-day disclosures were filed as directed on September 18, 2012 and the DPH was held on September 25, 2012. Petitioner elected for the hearing to be closed.

Petitioner's Exhibits 1-30 were admitted into evidence. DCPS Exhibits 1-4 were admitted into evidence and OSSE' Exhibits 1-3 were admitted into evidence.[2]

The following witnesses testified on behalf of the Petitioner: Grandparent, Clinical Social Work, Director of Non Public School, admissions Director of NPS and Director of NPS.

The following witnesses testified on behalf of the OSSE: Case Manger and Supervisor of Case Manager.

The following witnesses testified on behalf of the DCPS: Progress Monitor and Program Manger..

Motion History:

On July 27, 2012, DCPS filed a Motion to Dismiss the DPC alleging that: (1) the student was a resident of the State of Maryland and did not meet the IDEA requirement found at 20 U.S.C. 1412(a)(1)(A) of being "a child residing" in the District of Columbia; and (2) that "The fact that this student

[2] A list of all Exhibits entered into evidence is annexed hereto at Appendix "B"

may be a ward of the District of Columbia does not make the student a resident for IDEA purposes" because "this student has a foster parent awarded and that person is the parent, and the parent/Petitioner reside in Maryland" (34 C.F.R. 300.30) (Motion to Dismiss, page 2).

On August 1, 2012, Petitioner filed her opposition to DCPS' Motion to Dismiss asserting that the Student's grandmother is the Student's foster parent and that "When the parties met in June and July of 2012" DCPS and OSSE claimed responsibility for the Student and that DCPS and OSSE stated that they would identify and send referral packets to several nonpublic schools certified by OSSE for the purpose of identifying a location of service for this Student." Petitioner also asserted that DCPS identified itself as the LEA on the student's most recent IEP. (See Opposition Exhibit 1) and that DCPS identified and funded the Student's last placement, which was at a NPS School in Rockville, Maryland, *inter alia.*

By Order, dated August 7, 2012, DPCS' motion was denied because there was no showing that the Student's grandmother was acting in the place of the Student's "biological or adoptive parents" or that the Student's grandmother is "an individual who is legally responsible for the child's welfare" (34 C.F.R. 300.30(4). The motion was also denied because the Student's IEP dated June 8, 2012, identified DCPS as the LEA for the Student (Opposition Exhibit 1). Additionally, the evidence showed that DCPS previously located and funded the Student's last placement at the NPS in Rockville Maryland.

On August 7, 2012, OSSE filed a Motion to Dismiss. OSSE asserted that Petitioner's DPC must be dismissed because OSSE, as the SEA, is not the party responsible for providing the subject Student a FAPE. OSSE asserted that pursuant to D.C. Law, the Local Educational Agency (LEA), which was DCPS in this case, was the party responsible for providing the Student a FAPE DCMR (Title 5 Section 3000.1).

On August 9, 2012, Petitioner filed her opposition to OSSE's Motion to Dismiss and asserted that OSSE offered the Student a location of service (LOS) at a NPS in Montgomery County, Maryland, and thus assumed responsibility for the Student's LOS and for the provision of the Student's FAPE (Opposition, page 4). Petitioner also alleged in the DPC that OSSE's selection of the NPS as the "location of service" for the Student was inappropriate and that OSSE's selection of the LOS denied the Student a FAPE, *inter alia.*

By Order, dated August 14, 2012, OSSE's motion to dismiss was denied because the evidence showed that OSSE identified the NPS as the

LOS for the Student, which was referenced and since the DPC asserted that the LOS was inappropriate for the Student. As such, I found that Petitioner's DPC sets forth sufficient facts that could support a claim against OSSE with respect to the identification and appropriateness of the Student's LOS.[3]

On August 16, 2012 OSSE filed a motion to extend the compliance timeline for 30 days to align the timeline with DCPS because the 30-day resolution period, which applies to DCPS, did not apply to OSSE. The reason for the request was to promote judicial economy and avoid duplicative testimony and duplicative documentary evidence.

On August 23, 2012 the undersigned recommended to the Chief Hearing Officer that OSSE's motion to extend the timeline be granted.

By Order dated August 23, 2012, the Chief Hearing Officer granted OSSE's motion and the timeline for the HOD due date was extended from September 3, 2012 to October 3, 2012.

On August 22, 2012, DCPS filed a "Motion to Reconsider" my initial Order dated August 7, 2012, denying DCPS' motion to dismiss asserting that "the hearing officer denied the motion" because "there had been no showing that the Student's grandmother was acting in the place of the Student's "biological or adoptive parents" or that the Student's grandmother was "an individual who was legally responsible for the child's welfare" (34 C.F.R. 300.30(4))." DCPS asserted that at the time of the filing of the initial motion, "no one involved with the CFSA action, including Ms. Roth, had provided DCPS [with] copies of the relevant orders." The relevant Order referred to by DCPS was a "Permanency Planning" Order from D.C. Superior Court that indicated that "student resides with her grandmother in Maryland, and that the Student's grandmother is now the "surrogate parent." DCPS then stated that "The IDEA definition of parent includes a "surrogate parent who has been appointed in accordance with 300.519 or section 639(a)(5) of the Act." " Therefore, DCPS moved for a dismissal of all claims against the DCPS, as previously "urged," pursuant to IDEA at 20 U.S.C. sec. 1401(36), and 34 C.F.R. sec. 300.45. 34 C.F.R. section 300.45. DCPS asserted that the "Orders" (from Superior Court) showed that this Student had a foster parent and that foster parent is the "parent," and the parent/Petitioner resides in Maryland. As such, the Petitioner has no standing to proceed in this hearing

[3] Petitioner's Exhibit 2 annexed to her Opposition papers mistakenly identified OSSE's Notice of Location of Service as a PWN and it was referenced as such by this HO in the Order denying OSSE's motion to dismiss. Nevertheless, OSSE's motion to dismiss was denied because the DPC asserted that the location of service was inappropriate for the Student and it was undisputed that OSSE was the entity that determined the location of service for the Student.

in the District of Columbia against the DCPS because DCPS is not required to offer the Student a FAPE.

On August 23, 2012, DCPS filed a "Supplement" to its motion to reconsider, which were additional Orders from D.C. Superior Court wherein Pamela Roth, Esq. was appointed as Petitioner's counsel and the Petitioner as the Student's "surrogate parent," *nunc pro tunc* to May 17, 2010.

On August 27, 2012, Petitioner filed her opposition to DCPS' motion to reconsider my initial Order denying DCPS' motion to dismiss and asserted that although there was an Order from the D.C. Superior Court appointing Petitioner as the "surrogate Parent" for educational purposes, which was obtained in order for the Petitioner to file the within DPC, Petitioner is not the Student's legal parent and that the Student is committed to the care of the District of Columbia. As such, the Student meets the definition of a "ward" of D.C. and that DCPS is required to offer the Student a FAPE.

On August 29, 2012, Petitioner filed a "supplemental opposition" to DCPS' motion to reconsider" and attached several documents that support her position that DCPS and OSSE consider "wards" of the District of Columbia to be residents of D.C. for purposes of education and the IDEA.[4]

On August 27, 2012, during the Prehearing Conference, DCPS was advised that the were permitted to submit a "Reply" to Petitioner's "supplemental opposition." DCPS failed to do so.

By Order, dated September 4, 2012, DCPS's Motion to Reconsider was denied because there was no showing that the Student's grandmother was acting in the place of the Student's "biological or adoptive parents." I found that the "permanency planning" Orders from the D.C. Superior Court only provided Petitioner with the authority to act as the surrogate parent for educational matters, which enabled her to file the within DPC and that there was no showing that Petitioner is "an individual who is legally responsible for the child's welfare" (34 C.F.R. 300.30(4)). As such, I found that the factual allegations set forth in the DPC met the pleading standards required by the

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[4] Exhibit 1 is a Memorandum of Understanding between CFSA and DCPS from 2005 that identifies DCPS is the responsible party to pay for tuition for DC wards placed out-of state; Exhibit 2 is Professional Standards for CFSA regarding wards; Exhibit 3 –OSSE Response to Independent Accountant' s Report for 2011- 2012; Exhibit 4 –independent Accountant's Report for 2011- 2012; Exhibit 5 – Independent Accountant's Report 2009- 2012; Exhibit 6 – Independent Accountant's Report; Exhibit 7 – OSSE 2012 Response to Oversight Questions by the DC Council; Exhibit 8 – DCPS Responses (2011-2012) to Oversight Questions of DC Council.

IDEA.

On August 31, 2012, OSSE filed a Motion to for Summary Judgment. OSSE asserted that judgment must be entered in its favor and Petitioner's DPC must be dismissed, with prejudice, because there was no triable issue of fact. Specifically, OSSE asserted that Prior Written Notice for the NPS school as the LOS for the Student had not been challenged as inappropriate for the Student and therefore no factual issues exists as a matter of law (See, Motion for Summary Judgment page 7). OSSE also asserted that the two issues presented by Petitioner, to wit, "the length of travel and the police policies of Montgomery County had no bearing on the appropriateness of the location." Finally, OSSE asserted that judgment must be entered in its favor because the school identified by the Petitioner had not been certified and/or approved by OSSE (D.C. Municipal Regulations Title 5A Section 2800.3).

On September 5, 2012, Petitioner filed her Opposition to OSSE's Motion for Summary Judgment and asserted that the "Complainant" alleged that location of services identified by OSSE for the Student was "not appropriate because of the distance from the child's home and because of the School's location in Montgomery County wherein the child had negative interaction with the local police department." Petitioner also asserted that the Hearing Officer (HO) has the authority to place the Student at a school that is not certified by OSSE as per pursuant to 34 C.F.R. 300.513.

By Order, dated September 7, 2012, OSSE's motion for summary judgment was denied because I found that the DPC set forth facts alleging that the identified LOS was inappropriate for the Student because of the distance from the child's home and because the DPC asserted that the identified LOS in Montgomery County was inappropriate for the Student because the Students' history with the police department in Montgomery County had negative consequences with respect to the Student's social/emotional issues (DPC). Additionally, I found that under the IDEA an HO may place a student at a non-approved, non-public school Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13 (1993).

On August 31, 2012, the counsel for DCPS a Motion for Summary Judgment (Referred to by counsel as "Summary Decision"). DCPS asserted that the only issue alleged with respect to DCPS is whether DCPS was required to provide ESY services to the Student. DCPS contends that it could not provide ESY services without OSSE having identified a LOS. DPCS asserted that the "undisputed relevant facts in this matter which allow the IHO to decide the legal issue were as follows: "1. The Petitioner concedes and admitted during the PHC that DCPS included ESY on the June 2012 IEP; 2. The Petitioner further concedes that all that was required to implement the

IEP was for the student to have a location of services assigned to her; 3. Counsel for DCPS and counsel for OSSE agreed that OSSE has sole discretion and control over the assignment of locations for non-public placements; 4. OSSE took control over the assignment of non-public locations to parents on or about January 5, 2010; and 5. That DCPS was unable to issue a location of services to the parent and OSSE was the agency solely responsible for the assignment of the location for ESY." (Motion to Dismiss page 2).

On September 5, 2012, Petitioner filed her Opposition to DCPS' Motion for Summary Judgment and asserted that although DCPS claimed it could not provide ESY services to the Student because OSSE failed to identify a LOS for the ESY services, up until July 2012, DCPS claimed to Petitioner that DCPS was responsible for the identification of the LOS for the Student and that at "no time prior to July 2012 did DCPS advise Petitioner that it could not provide ESY services due to the failure of the OSSE to identify a location of service." Petitioner also asserted that DCPS had provided the Student with home/hospital schooling for most of the second semester during 2011-2012 school year and that DCPS "could have continued to do so for ESY." Additionally, Petitioner asserted that although DCPS claimed that OSSE actually took over responsibility for identifying non-public LOS for students on January 5, 2010, DCPS "had in fact identified locations of service for this [S]tudent at all times prior to and between January 5, 2010 and July 31, 2012" and that DCPS had identified a NPS is Montgomery County as a location of service for the Student before OSSE did in 2012, "but never acted on it."

By Order, dated September 7, 2012, DCPS' motion for summary judgment with respect to the ESY claim was denied because Petitioner alleged that DCPS denied the Student a FAPE by failing to provide the Student with ESY services for the 2011-2012 school and, as such, there remained a question of fact as to whether DCPS, as the LEA, could have identified a LOS for the Student prior to contacting OSSE and whether DCPS could be relieved of its responsibility of providing FAPE to the Student when it requested that OSSE make a referral for a LOS for the Student. As such, I found that issues a fact existed with respect to whether DCPS denied the Student a FAPE by failing to provide ESY services for the 2011-2012 school year (DPC).

II JURISDICTION

The Due Process Hearing was held in accordance with the rights established under the Individuals with Disability Education Act 2004 ("IDEIA"), and its implementing regulations at 20 U.S.C. Section 1400 et

seq., Title 34 of the Code of Federal Regulations, Part 300; and Title 38 of the D.C. Code, Subtitle VII, Chapter 25. This decision constitutes the Hearing Officer's Determination (HOD) pursuant to 20 U.S.C. §1415 (f), 34 C.F.R. §300.513. The HOD is due by October 3, 2012.

III. ISSUES PRESENTED

The following issues were certified for adjudication at the due process hearing:

1. Whether the Student was denied a FAPE by DCPS and OSSE when they failed to indentify and place the Student at an appropriate academic setting for the 2012-2013 school year. Specifically, whether the LOS identified by the Respondents for the 2012-2013 denied the Student a FAPE because it was too far for the Student to travel based on her social/emotional deficits and whether the LOS was inappropriate because the school was located in a county in which the Student has had a history of involvement with the police at school that had caused her emotional harm.

2. Whether DCPS denied the Student a FAPE by failing to provide the Student with ESY services during the 2011-2012 school year.

Petitioner requests an Order directing DCPS to place the Student in a non-public, self contained school in Frederick County, Maryland with transportation and compensatory education services.

IV. FINDINGS OF FACT

The Student is a [redacted] special education student who last attended a NPS in Rockville, Maryland that was funded by DCPS (Due Process Complaint-DPC). The Student is a "ward" of the District of Columbia who was placed with her Grandmother through the Child and Family Services Agency (CFSA) of Washington, D.C. in Frederick, Maryland (DPC) since May of 2010 (Testimony of Petitioner). The Student is eligible for special education and related services under the IDEA as a child classified with a "emotional disturbance" (ED) (Exhibit P-33-IEP dated 6/8/12).

The Student suffers from a Mood Disorder NOS, Post Traumatic Stress Disorder (PTSD), and Attention-Deficit/Hyperactivity Disorder (ADHD) and has clinically significant levels of anxiety and depression (Exhibit R-31, page 3).

The Student is an "extremely" vulnerable child whose emotional condition is related to significant anxiety and depression, which affects her

self esteem, self image and her ability to engage others appropriately as well as be successful in school (Exhibit R-1). The Student has suicidal ideation, when she feels threatened or stressed (Exhibit R-1) and experiences hallucinations when she travels for a long period of time (Testimony of Clinical Social Worker). The Student also engages in self-injurious behaviors such as "severely" biting her nails, scratching her skin until it bleeds and hitting her head (Testimony of Petitioner, Exhibit P-7, page 1).

The Student has a full scale IQ of 92 and a Broad math Standard Score (SS) of 95 and Broad reading SS of 93 (Exhibit R-1).

In January 2012, OSSE began identifying LOSs for DCPS placements at NPSs (Testimony of OSSE Director of Placement). Once the DCPS determines that a change in the LOS for a NPS is appropriate for a student, DCPS would make a referral to OSSE to identify the LOS. OSSE then identifies the LOS and refers the case back to DCPS to issue PWN for the Student to attend the LOS (Testimony of OSSE Case Manager). Transportation to LOS identified by OSSE is the responsibility of the LEA. (Testimony of OSSE Case Manager).

From January 2012 to June 2012, the Student received Home and Hospital Instruction (HHI) as a result of several psychiatric hospitalizations (Exhibit P-4). A special education teacher in the county in Maryland where the Student lives provided the HHI services. However, the services were funded by DCPS (Testimony of DCPS Progress Monitor).

On or about May 2012, DCPS was aware that the Student would be terminated for HHI and would need a LOS to service the Student's IEP, which included the Student ESY services for the summer of 2012 (Testimony of DCPS Progress Monitor, Exhibit R-1, Exhibit P-10).

On June 8, 2012, DCPS convened an IEP meeting and developed an IEP for the Student (Exhibit R-1). An OSSE Placement Coordinator was present at the IEP meeting. DCPS recommended a placement in a NPS. During the IEP meeting, Petitioner advised DCPS and OSSE that any LOS identified for the Student must not require significant travel because the stress of extended travel is a trigger for the Student to engage in self-injurious behaviors (Testimony of Petitioner, Exhibit R-2). Petitioner identified two possible LOS' for the Student in Fredrick County Maryland that were located close to the Student's home. DCPS could not agree to the LOS proposed by Petitioner because the schools proposed by Petitioner did not have a Certificate of Approval (COA) from OSSE (Testimony of Progress Monitor).

On June 17, 2012, DCPS, OSSE and Petitioner met to discuss the LOS for the Student. DCPS and OSSE again rejected Petitioner's proposed NPS located in Fredrick County because the school did not have a COA from OSSE (Testimony of Progress Monitor). DCPS and OSSE proposed sending a referral packet to a NPS located in Montgomery County Maryland. Petitioner objected to any school in Montgomery County because of distance from the Student's home and the amount of time it would take the Student to travel to a school in Montgomery County. Petitioner also objected to any school in Montgomery County because when the Student last attended school in Montgomery County (2011-2012 school year), the Student was involved in a incident with the Montgomery County Police Department who handcuffed the Student and placed her in a "paddy wagon" (Petitioner's Testimony). Petitioner advised DCPS and OSSE that she was concerned that if the Student is placed at a LOS in Montgomery County again, that any police involvement will further traumatize the Student (Testimony of Petitioner).

On June 15, 2012, the Student was accepted at the NPS selected by the Petitioner located in Fredrick County Maryland. (Exhibit P-15, Testimony of Admissions Director).

On June 25, 2012, Student was terminated for HHI services (Testimony of Petitioner) and ready to transition back to school (Testimony of Clinical Psychologist).

On June 26, 2012, ESY services for the 2011-2012 school year began for DCPS Students (Testimony of DCPS Case Manger).

The Student did not receive any ESY services during the summer of 2012 (Testimony of Petitioner). The Student was available for ESY during the moth of July 2012 and for the first three weeks of August 2012 (Testimony of Petitioner).

On June 26, 2012, OSSE received a referral packet for the Student from DCPS with respect to identifying a LOS (Testimony of OSSE Case Manger).

On July 17, 2012, a DCPS Program Monitor for residential placement advised Petitioner's counsel that she required a letter from the Student's doctor advising that the Student was permitted to return to school before DCPS would allow the Student to return to school (Exhibit R3). A doctor's "release" letter clearing the Student to go back to school is not a DCPS regulation or rule, but the DCPS Program Manager's practice (Testimony of DCSP Program Manager). DCPS did not tell OSSE that DCPS needed a

"release" letter from the Petitioner in order for the Student to return to school (Testimony of OSSE Case Manager).

Although the DCPS Program Manager believes that Fredrick County in the State of Maryland is the Student's LEA, the Student's last IEP was developed by DCPS and DCPS had issued PWN for the Student with respect to placement for the 2012-2013 school year (Testimony of Program Manager, DCPS Exhibit R-1, R-4). Additionally, as indicated above, the Student is a ward of the District of Columbia. As such, I find the DCPS is the LEA for the Student.

The Student receives psychotherapy two times per week in the home (Testimony of Clinical Social Worker).

On July 31, 2012, OSSE identified a LOS for the Student in Montgomery County (Exhibit R-3, page 5). By Letter dated July 31, 2012, OSSE advised Petitioner and DCPS of the LOS (Testimony of OSSE Case Manager, Exhibit DCPS R-3, page 5,). As per the OSSE letter dated July 31, 2012, DCPS was required to issue Prior Written Notice for the Student to attend the LOS identified by OSSE (Testimony of OSSE Case Manager). OSSE would then fund the NPS (Testimony of OSSE Case Manager).

OSSE selected the LOS for the Student because it was the NPS that was closest to the Student's home that had a COA issued by OSSE (Testimony of OSSE Case Manager). OSSE estimated the travel time to the LOS as a 36-minute drive according to Map Quest (Testimony of OSSE Case Manager). However, the travel time estimate offered by OSSE did not consider traffic and/or the route the bus would take when other students were on the bus (Testimony of OSSE Case Manager). The actual travel time to the LOS identified by OSSE and DCPS could average fan hour to an hour and a half, each way, depending on traffic and the amount of students on the bus (Testimony of Clinical Social Worker, Testimony of Petitioner). The Student cannot tolerate this length of travel time to and from school each day (Testimony of Social Work, Testimony of Petitioner). The Student requires frequent breaks when traveling long distances (Testimony of Petitioner). The stress of extended travel causes the Student to experience anxiety, hyperventilate and engage in self-injurious behaviors ((Testimony of Social Work, Testimony of Petitioner).

On August 1, 2012, DCPS issued PWN for the LOS at the NPS identified by OSSE (Exhibit DCPS R-3, page 3). The PWN states, in part, that "Pursuant to the OSSE location assignment notice issued on 7/31/2021 the LEA proposes to change the location services for [Student] to the [NPS] [in] Montgomery County effective immediately" (DCPS Exhibit R-3, page 3).

On September 5, 2012, DPCS issued a second PWN for the LOS identified by OSSE located in Montgomery County (Exhibit DCPS R-4).

All parties agreed that the Student requires a Non-Public Placement for the 2012-2013 school year (Exhibit R-1)

The NPS identified by the Petitioner does not have a COA from the OSSE (Testimony of OSSE Case Manager). However, the NPS reviewed the Student's IEP and determined that they could meet the Student' academic and social/emotional needs. The NPS provides individual, group and family therapy and has a 24-hour nursing staff as well as several psychiatrists on staff to work with student during the school day. Positive behavior plans are developed for each student and the school is affiliated with a residential program that has a COA issued from OSSE. The NPS services Student with ED as well students who suffer from PSTD, ADHD and anxiety and depression (Testimony of Admission Director, Testimony of Director of NPS).

The curriculum at the NPS is approved by the State of Maryland and student can earn a Maryland Diploma. The curriculum would be modified to meet the Student's needs and the NPS would make sure that its curriculum is compatible with the DCPS curriculum (Testimony of Director of NPS). All teachers are "provisionally" in special education certified by the State of Maryland (Testimony of Director of NPS). The NPS is located 13 miles from the Student's home and the NPS offers year round services. Class sizes range from 8-9 students with one teacher and one assistant teacher. Students transition from classes during the school day. However, the students can be escorted to class, if necessary (Testimony of Director of NPS).

Transportation by bus from the Student's home to the NPS would take approximately 30 to 45 minutes or only 15-minutes if the Student were driven by Petitioner (Testimony of Admission Director, Testimony of Petitioner).

No one testified at the impartial hearing from the NPS located in Montgomery County.

The OSSE stipulated that the NPS selected by the Petitioner was appropriate for the Student (Statements of Counsel).

Petitioner's request for compensatory education services for the alleged denial of ESY services during the 2011-2012 school year is placement at the NPS identified by Petitioner located in Fredrick County Maryland for the 2012-2013 school year (Statement by Counsel for Petitioner).

V. BURDEN OF PROOF

The burden of proof in a special education due process hearing lies with the party seeking relief. DCMR 5-3030.3; see, Schaffer v. Weast, 546 U.S. 49 (2005).

VI. SUMMARY

The Hearing Officer concludes that Petitioner has met her burden of proof with respect to issues 1, in part, and with respect to issue 2 listed above.

VII CREDIBILITY DETERMINATIONS

I find that all of the witnesses at the due process hearing provided credible testimony. However, I do not credit the testimony of the DCPS Program Monitor for residential placement with respect to whether Petitioner was required to obtained a letter from the Student's doctor before the Student was permitted to return to school and receive ESY services. The evidence shows that a "release" letter clearing the Student to go back to school is not a DCPS regulation or rule, but the DCPS Program Manager's practice (Testimony of DCSP Program Manager). Additionally, DCPS did not inform OSSE that DCPS needed a "release" letter from the Petitioner in order for the Student to return to school (Testimony of OSSE Case Manager). As such, I will not credit the DCPS Program Monitor's testimony on this issue.

VIII. ANALYSIS AND CONCLUSIONS OF LAW

A free appropriate and public education "consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Bd. Of Education v. Rowley, 458 U. 176, 188-89, 73 L. Ed. 2d 690, 102 S. 0.3034 (1982). Under Rowley, a child is deprived of a free and appropriate public education: (a) If the LEA violated the IDEA's procedural requirements to such an extent that the violations are serious and detrimentally impact upon the child's right to a free and appropriate public education, or (b) if the IEP is not reasonably calculated to enable a child to receive educational benefits.

Under the IDEA, the federal government provides funding to states and local educational agencies, including those of the District of Columbia, see 20 U.S.C. § 1401(31), for the education of disabled children. As a

condition of receiving that funding, an educational agency must maintain policies and procedures ensuring that a "free appropriate public education is available to all children with disabilities residing in the [jurisdiction] between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). A "central component of a disabled student's special education under the IDEA" is the individualized education program ("IEP"), which is a written statement setting out the student's "individually tailored goals and the means of achieving them." *District of Columbia v. Doe,* 611 F.3d 888, 892 n.5 (D.C. Cir. 2010) (citing 20 U.S.C. § 1414(d)).

OSSE and DCPS:

In Order to decide the first issue raised by petitioner, I must address the issue as to whether OSSE, as the SEA, or DCPS, as the LEA, is responsible for providing FAPE to this Student.

Effective October 1, 2008, the OSSE implemented a Policy and Procedure for Placement Review ("PPPR"), to ensure that LEAs provide services in the lease restrictive environment (LRE) consistent with the requirements of the IDEA. (See PPPR at p. 1 and 34 C.F.R. Section 300. 114). This includes assisting LEAs in identifying NPS for their students who require a NPS placement (Testimony of OSSE Director of Placement). OSSE initiated this policy with the Charter schools in the District of Columbia and then expanded the policy n January 2012, to identifying LOS's for DCPS placements at NPS (Testimony of OSSE Director of Placement). The evidence shows that once the DCPS determines that a change in the LOS for a NPS is appropriate for a student, DCPS, in general, would make a referral to OSSE to identify the LOS. OSSE then identifies the LOS and refers the case back to DCPS to issue PWN for the Student to attend the LOS (Testimony of OSSE Case Manager).

In this case, OSSE received a referral packet from DCPS on June 26, 2012 requesting that OSSE identify a LOS at a NPS for the Student (Testimony of OSSE Case Manger). On July 31, 2012, OSSE identified a LOS for the Student in Montgomery County (Exhibit R-3, page 5) and, by letter, dated July 31, 2012, OSSE advised DCPS to issue PWN for the Student to attend the LOS identified by OSSE (Testimony of OSSE Case Manager). Thereafter, on August 1, 2012 and on September 5, 2012, DCPS issued PWN for the LOS at the NPS identified by OSSE (Exhibit DCPS R-3, page 3). The PWN states, in part, that "Pursuant to the OSSE location assignment notice issued on 7/31/2021, the LEA "proposes to change the location services for [Student] to the [NPS] [in] Montgomery County effective immediately" (DCPS Exhibit R-3, page 3). Although the evidence presented demonstrates that OSSE agreed to assist DCPS with identifying the LOS for this Student, no evidence was presented to demonstrate that the OSSE assumed the LEA's

responsibility for the provision of FAPE to this Student. Significantly, since LEAs in the District of Columbia are responsible for providing FAPE to children with disabilities (See, D.C. Mun. Regs. Title 5, Section 300), I find that OSSE is not the responsible party herein and the DCPS, as the LEA, is the party responsible for providing FAPE to this Student.

Issue 1:

The first issue raised by Petitioner is whether the Student was denied a FAPE by DCPS and OSSE when they failed to indentify and place the Student at an appropriate academic setting for the 2012-2013 school year. Specifically, whether the LOS identified by the OSSE and DCPS for the 2012-2013 denied the Student a FAPE because the LOS was too far for the Student to travel based on her social/emotional deficits and whether the LOS was inappropriate because the school was located in a county in which the Student has had a history involvement with the police at school that had caused her emotional harm.

Here, the evidence shows that the Student is an "extremely" vulnerable child whose emotional condition is related to significant anxiety and depression as well a PTSD and ADHD (Exhibit R-31, page 3). The evidence shows that the Student experiences suicidal ideation when she feels threatened or stressed (Exhibit R-1) and that the Student engages in self-injurious behaviors such as scratching her skin until it bleeds and hitting her head when she travels for a long periods of time (Testimony of Clinical Social Worker. Testimony of Petitioner, Exhibit P-7, page 1). The evidence also shows that the Student cannot travel long distances in a car or a bus without taking frequent breaks (Testimony of Petitioner).

During the IEP meeting held on June 8, 2012, (Exhibit R-1) Petitioner advised DCPS and OSSE that any LOS identified for the Student must not require significant travel because the stress of extended traveling is a trigger for the Student to engage in self injurious behaviors (Testimony of Petitioner, Exhibit R-2). As indicated above, DCPS issued PWN for the Student to attend the LOS (identified by the OSSE) in Montgomery County (Exhibit R-3, page 5). Although OSSE estimated the travel time to the LOS as a 36-minute drive based on their "Map Quest" search, (Testimony of OSSE Case Manager), the evidence shows that their travel time estimate did not consider traffic and/or the route the bus would take when other students on the bus (Testimony of OSSE Case Manager). Significantly, the actual travel time to the LOS could average from an hour to an hour and a half, each way, depending on traffic and the amount of students on the bus (Testimony of Clinical Social Worker, Testimony of Petitioner). The evidence shows that the Student cannot tolerate this length of travel time to and from school each day because the

stress of extended travel causes the Student to experience anxiety, hyperventilate and engage in self-injurious behaviors ((Testimony of Social Work, Testimony of Petitioner). Accordingly, I find that the NPS identified as the LOS for the Student would not provide FAPE because the Student cannot tolerate the length of travel time to and from each day and that compelling the Student to do so would pose a serious and unnecessary health risk to the Student.

Although the LEA typically has the discretion with respect to the selection of the LOS, that discretion cannot be exercised in such a manner to deprive a Student of a FAPE Holmes v. District of Columbia, et al, 680 F. Supp. 40 (U.S. District Court, District of Columbia).

With respect to whether the LOS was inappropriate because the school was located in a county in which the Student had a history of involvement with the police at school that has caused her emotional harm, no evidence was presented at the impartial hearing to support a finding that the Montgomery County Police protocols would result in a denial of FAPE to the Student. Accordingly, Petitioner's request for a finding of a denial of FAPE on this theory is denied.

Issue 2:

The second issue is whether DCPS denied the Student a free and appropriate public education by failing to provide the Student with ESY services during the 2011-2012 school year.

Pursuant to 34 C.F.R. Section 300.106: (1) each public agency must ensure that extended school year services are available as necessary to provide. FAPE consistent with paragraph (a)(2) of this section. (2) extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child."

ESY services are considered to be necessary when there is evidence of regression without such services, and that the student lacks the ability for recoupment in a reasonable period of time. See, Independent School District No. 709, Duluth v. Bonney, 44 IDELR 191 (Minn. Ct. App. 2005).

Here, the evidence shows that on June 25, 2012 Student was terminated for HHI services and ready to transition back to school (Testimony of Clinical Psychologist). ESY services for DCPS Students began on June 26, 2012 (Testimony of DCPS Case Manger). It is undisputed that the Student did not receive any ESY services during the

summer of 2012 (Testimony of Petitioner). Although DCPS contends that they were not required to offer ESY services to the Student because the case had been referred to OSSE on June 26, 2012, as I indicated above, OSSE's assistance to DCPS with respect to the LOS did not relieve DCPS of their LEA responsibility to provide FAPE to this Student. Accordingly, since the evidence shows that the Student was available for ESY services from June 26, 2012 through the first three weeks of August 2012, I find that DCPS' failure to make any provision for ESY denied the Student FAPE. However, because the evidence shows that DCPS had issued PWN for placement at the NPS identified by OSSE on August 1, 2012, which was effective "immediately," I find that the Student was denied a FAPE with respect to ESY services from June 26, 2012 to August 1, 2012.

Further, as I indicated above, I will not credit the testimony of the DCPS Program Monitor who claimed that Petitioner was required to obtained a letter from the Student's doctor before the Student was permitted to return to school and receive ESY services. The evidence shows that a "release" letter clearing the Student to go back to school is not a DCPS regulation or rule, but the DCPS Program Manager's practice (Testimony of DCSP Program Manager). As such, the "practice" of this particular DCPS Program Monitor is no defense to DCPS' failure to provide the Student ESY services during the summer of 2012.

Private School Placement:

The evidence shows that the Student requires a full-time IEP with specialized instruction for all classes outside the general education setting for the entire school day in a NPS (DCPS Exhibit R-1) The evidence also shows that the Student requires a NPS that does not require significant travel time to and from the Student's home (Testimony of Clinical Social Worker, Testimony of Petitioner).

The NPS identified by the Petitioner does not have a COA from the OSSE (Testimony of OSSE Case Manager). However, the OSSE agreed that the NPS was appropriate for this Student (Statements of Counsel). The NPS provides individual, group and family therapy and has a 24-hour nursing staff as well as several psychiatrists on staff to work with the Student during the school day. Additionally, the NPS is affiliated with a residential program that has a COA issued from OSSE.

The curriculum at the NPS is approved by the State of Maryland and the NPS would make sure that its curriculum is compatible with DCPS' curriculum (Testimony of Director of NPS). All teachers are "provisionally" certified in special education by the State of Maryland and class sizes range

from 8-9 students with one teacher and one assistant teacher. (Testimony of Director of NPS). The NPS is located approximately 13 miles from the Student's home and transportation by bus from the Student's home to the NPS would take approximately 30 to 45 minutes or only 15-minutes if the Student were driven by Petitioner. Accordingly, I find that the evidence demonstrates that the services offered at the NPS selected by Petitioner match the needs of the Student. I also find that the NPS is appropriate to meet the needs of this Student because it is undisputed that the Student requires a NPS and because transportation by bus from the Student's home to the NPS would not pose a health risk to the Student (Testimony of Admission Director, Testimony of Petitioner).

Further, I find that the Private School is the Student's least restrictive environment (LRE) because the evidence shows that the Student requires a self-contained school and that the Student's LRE is a placement in a NPS (DCPS Exhibit R-1). Finally, the cost of the NPS is $247 per day, which I find is not unreasonable. Accordingly, Petitioner's request for funding for the Student's placement at the NPS for the 2012-2013 school year is granted. Branham v. District of Columbia, 427 F.3d 7, 12 (D.C. Cir. 2005).

Equities:

I find that the equities support an award of prospective funding for the Student's placement at the NPS for the 2012-2013 school year because the evidence shows that Petitioner cooperated with the IEP process and no evidence was presented to the contrary.

Compensatory Education:

Petitioner's request for compensatory education services for the alleged denial of ESY services during the 2011-2012 school year is placement at the NPS identified by Petitioner located in Fredrick County Maryland for the 2012-2013 school year (Statement by Counsel for Petitioner).

Where a school system fails to provide special education or related services to a disabled Student, the Student is entitled to compensatory education, which is the replacement of educational services that the child should have received in the first place. Reid v. District of Columbia, 401 F 3d. 516 (D.C. Cir. 2005).

Here, I found the Student was denied ESY services from June 26, 2012 to August 1, 2012. As such, the Student is entitled to compensatory education services. However, Petitioner did not request any additional compensatory education services other than Placement at the NPS in

Frederick County Maryland for the 2012-2013 school year. Additionally, no evidence was offered to determined what, if any, additional amount of compensatory education services were required to make the Student whole. As such, based on the evidence presented, I cannot award any additional compensatory education services for this Student.

Transportation:

DCPS shall provide the Student with appropriate transportation to and from the NPS located in Frederick Maryland during the 2012-2013 school year.

ORDER

Based upon the Findings of Fact and Conclusions of Law herein, on this 28th day of September 2012, it is hereby

ORDERED that DCPS shall fund the Student's placement at the NPS located in Fredrick Maryland for the 2012-2013 school year and provide transportation to and from school.

ORDERED that the DPC as against the OSSE is dismissed, with prejudice.

Dated September 28, 2012

By: /s/ James McKeever
Hearing Officer

NOTICE OF APPEAL RIGHTS

The decision issued by the Hearing Officer is final, except that any party aggrieved by the findings and decision of the Hearing Officer's Determination shall have 90 days from the date of the decision of the hearing officer to file a civil action with respect to the issues presented at the due process hearing in a district court of the United States or a District of Columbia court of competent jurisdiction, as provided in 20 U.S.C. Section 1415(i)(2).

Distributed to:

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